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7 UNITED STATES DISTRICT COURT
8
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA
10
11 SAN JOSE DIVISION

12 MICHAEL ANGELO MORALES,

13 Plaintiff,

14 vs.

15 JAMES E. TILTON, et al.,

16 Defendant

) Case No.: C 06 219 JF RS

) Case No.: C 06 926 JF RS

)
) DEATH PENALTY CASE

) **BRIEF OF AMICUS CURIAE SALLY J.**
) **LIEBER IN OPPOSITION TO**
) **DEFENDANTS' JOINT MOTION FOR A**
) **PROTECTIVE ORDER**

) Date: February 23, 2007

) Time: 1:30 p.m.

) Place: Courtroom 3, San Jose

)

17 **I. INTRODUCTION**

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19
20 The people have the right of access to
21 information concerning the conduct of the
22 people's business and, therefore, the
23 meetings of public bodies and the writings
24 of public officials and agencies shall be
25 open to public scrutiny.
26 Cal. Const., art. I, section 3(b)

27 A government that can hide what it does will never be
28 accountable to the public it is supposed to serve. Recognizing
this fact, California citizens in 2004 voted overwhelmingly to

1 create a broad a constitutional right to access government
2 information. A patchwork of existing laws were unified and
3 strengthened by this sweeping change.
4

5 As this Court has recognized, the death penalty is the
6 source of one of the great social debates of our time. It
7 represents the strongest exercise possible of government power,
8 the taking of human life as the ultimate punishment for crime.
9 Most importantly, it is an act performed in the name of the
10 people. Indeed, the death penalty was reaffirmed through direct
11 action of the voters as Proposition 7 on the November 1978
12 ballot.
13

14 The motion before this Court presents the convergence of
15 these two major ideas. With all due respect to this Court, the
16 eventual outcome of the government's attempt to keep secret the
17 process of reforming the flawed lethal injection procedure is
18 predetermined, whatever the Court decides on the current motion.
19 No aspect of the administration of the death penalty can be
20 conducted in private if the State seeks to legitimize its
21 continued use. The defendant's motion should be denied.¹
22
23

24 ¹ This *amicus* brief is submitted by Sally J. Lieber, a Mountain View, California
25 resident and taxpayer, Speaker pro Tempore of the California State Assembly, and a
26 State witness to the lethal injection execution of Clarence Ray Allen on January 17,
27 2006. As a legislator she has authored, debated, and voted on legislation concerning
28 the death penalty. She submits this brief not to intervene in the case-in-chief in
any manner, or to repeat the points ably made in other opposition briefs, but rather
to present the Court with additional information relevant to the pending motion from
the viewpoint of a citizen, legislator, and state's witness. She requests leave to
intervene on defendant's present motion to present the arguments made in this brief.

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2 **II. DEFENDANTS ARE NOT THE ONLY GOVERNMENT ACTORS INVOLVED IN**
3 **REFORMING THE LETHAL INJECTION PROCESS. ALL BRANCHES OF**
4 **GOVERNMENT WILL ULTIMATELY BE INVOLVED AND WILL NEED THE**
5 **INFORMATION DEFENDANTS SEEK TO CONCEAL.**

6 The California Legislature has seen the introduction of 23
7 bills and resolutions in the past four years concerning some
8 aspect of the death penalty. Every substantive aspect of the
9 consideration of these bills occurs with public knowledge and
10 involvement, following a clearly prescribed legislative cycle.
11 The record of a bill's passage through the legislature produces
12 a trail of evidence open to all, and is often researched and
13 cited to help determine legislative intent. Legislators will
14 almost certainly be called upon to consider the revised
15 procedures currently being drafted by the defendants, and the
16 deliberative process that occurred is essential to evaluating
17 the end product. In fact, the current use of lethal injection
18 is not a product of any Executive branch order, but rather the
19 result of the enactment of Assembly Bill 2082 in 1996, which
20 prescribed it as the default method.
21

22 Litigants in state courts routinely seek judicial
23 intervention in death penalty cases. California courts are
24 called upon daily to consider the actions of the Governor and
25 the Legislature in this respect. Jurists, in their ongoing
26 consideration of death penalty issues, will need the information
27
28

1 the defendants seek to protect. Indeed, this very Court would
2 benefit from the information as it considers the question it
3 defined in the Memorandum of Intended Decision dated December
4 15, 2006.

5
6 How, then, can the Department of Corrections and
7 Rehabilitation seek to consider reforming the broken lethal
8 injection procedure away from public scrutiny? What
9 justification could there possibly be for simply issuing new
10 procedures as a *fait accompli*?

11
12 It is inevitable that all changes made or proposed by the
13 Executive Branch defendants to existing lethal injection
14 procedure will be reviewed in some way by the Judicial and
15 Legislative branches. And it is preferable to get the necessary
16 background information now, rather than attempting to piece it
17 together later.

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20 **III. DEFENDANTS' MOTION IS ANTICIPATORY AND PREMATURE**

21 The stated justification for Defendant's motion is a need
22 for protection from burdensome discovery demands - none of which
23 have actually occurred, or they would certainly have been cited
24 in the movant's papers. Given the overwhelming presumption in
25 favor of open government, for defendants to seek a protective
26 order merely in anticipation of discovery and information
27
28

1 requests is unjustifiable and a perversion of the intent of the
2 state constitution.

3 To grant blanket protection to defendants would be in the
4 nature of a litigant seeking a prior restraint on publication -
5 a disfavored technique in First Amendment litigation. Were
6 plaintiff to request a parallel ruling that no protection from
7 discovery adheres to any of the information at issue here, it
8 would almost certainly be denied as premature and overly broad.
9

10 The freedom of information laws are designed to deal with
11 this situation - on a case-by-case basis - and there is no
12 justification for abandoning them here on the basis of
13 defendant's mere *ipse dixit*. Any document or record truly
14 deserving of protection will be accorded protection. In this
15 regard, Florida's governmental response to this same issue of
16 flawed lethal injection procedure is proceeding in public by
17 order of the governor. Where an exception is necessary and
18 justified, protection and privacy are granted. An example is
19 the medical expert testimony from doctors who would not
20 otherwise testify.
21
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25 **IV. CONCLUSION**

26 "When government begins closing doors, it selectively
27 controls information rightfully belonging to the
28 people." Detroit Free Press v. Ashcroft, 303 F. 3d
681, 683 (6th Cir. 2002).

1
2 The very openness demonstrated by this Court in its
3 thorough evaluation of the current status of lethal injection
4 procedure (detailed in the Memorandum of Intended Decision at
5 p.3) can serve as a benchmark for the defendants' review and
6 revision of that procedure. The motion for a protective order
7 should be denied.
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12 Dated this 23rd day of
13 February, 2007
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